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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-55

ALBERT C. KOSKA,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Albert C. Koska petitions for a writ of certiorari to review the judgment of The United States Court of Appeals for The Second Circuit in this case, entered on June 10, 1971.

Opinion Below

The opinion of the Court of Appeals (App. pp. 1a-4a, *infra*) is not yet reported.

Jurisdiction

The opinion and judgment (App. p. 5a, *infra*) of the Court of Appeals was entered on June 10, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Question Presented

Whether typewritten transcripts of conversations between a criminal defendant and a government agent secretly tape recorded by means of electronic listening and recording devices should be admitted into evidence at trial and given to the jury during deliberations?

Statement

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of giving $750 to an Internal Revenue Agent with intent to influence his action on a field audit examination of the tax return of a client of petitioner, in violation of 18 U.S.C. § 201(b).

The Government's evidence consisted primarily of the testimony of Revenue Agent Leopold Fasone concerning four conferences held in the office of petitioner, a certified public accountant, during an audit of a client's income tax return. In addition, the Government offered in evidence tape recordings of the last two conferences between petitioner and the agent which were obtained by means of hidden electronic listening and recording devices.

According to the Revenue Agent, the first two sessions on the audit concerned a review of the taxpayer's books and records with considerable discussion devoted to the taxpayer's expense deductions. Towards the end of the second conference, the agent testified that petitioner offered to pay the expenses of the agent's recent trip to Florida, but the agent told petitioner to forget about it. Petitioner specifically denied ever having made such an offer. Upon leaving petitioner's office, the agent called the office of the Regional Inspector and reported the incident. Approximately six months after this incident, the third conference on the audit took place in petitioner's

office. The agent was equipped with a miniphon in his briefcase and a transmitting microphone disguised as a tie clip. At the same time, inspectors from the Regional Inspector's office set up receiving and recording devices elsewhere in the office building, and one of the inspectors recorded the conversation between Revenue Agent Fasone and petitioner on a tape recorder connected to the receiver. During this meeting, a conversation was had concerning settling the audit by a payment of $1,000 to the agent. At the fourth and final conference between petitioner and the agent, the conversations were again recorded in the same manner as above. Petitioner and the agent agreed on a payment of $750 to settle the audit, which amount was handed to the agent by petitioner in an envelope.

Petitioner testified at trial and claimed that he had been entrapped into making the $750 payment to Agent Fasone. Petitioner testified that the agent referred constantly during the first two conferences to his family's high cost of medical expenses and his lack of money to pay for them. At each conference, the agent insisted on disallowing items of the taxpayer's expenses despite substantiation for these expenditures. Adjustments which had previously been agreed upon between petitioner and the agent were again raised at subsequent meetings. During the third meeting, where the conversations were tape-recorded, petitioner suggested that an adjustment on the audit be made similar to adjustments previously made. Fasone suggested that "something could be worked out" concerning an adjustment and the agent extended two fingers and almost inaudibly stated "two", to which petitioner replied "How about a thousand?"

Among the exhibits admitted into evidence were typewritten transcripts of the taped conversations of the third and fourth meetings. The jury was allowed to read the transcripts while listening to the tapes and later, upon request, was allowed to have twelve copies of the typewritten transcripts during deliberations. The transcript

of the first conversation was 51 pages long and the second was 41. The trial court admitted these transcripts into evidence and permitted the jury to use them during deliberations over defense counsel's objections that the transcripts unduly emphasized the taped conversations because the jurors would have the cumulative effect of the testimony of the agent, the tape recordings and the transcripts and, secondly, the transcripts constituted a typewritten substitute of what the jurors listened to through the tape recordings. Although the trial judge indicated that the transcripts were not to be given "independent" or "separate" force by the jury, they were given to the jury, during deliberations, without any limiting instructions, over objection of both counsel for the Government and counsel for the defendant.

Reasons for Granting the Writ

In *United States* v. *White,* 39 U. S. Law Week 4387 (4/5/71), the Court upheld the Government's right under the Fourth Amendment to secretly record conversations between a defendant and a Government agent. The instant case, however, presents a situation which extends the normal use at trial of a recorded conversation by allowing the jury at trial and during deliberations to have typewritten transcripts of the recorded conversations. There is substantial conflict among the circuit courts as to the admissibility and use of transcripts of recorded conversations which should be resolved by this Court.

I

The Circuit Courts have reached conflicting results in attempting to determine whether typewritten transcripts of recorded conversations are admissible in evidence. *Compare Fountain* v. *United States,* 384 F. 2d 624 (C. A. 5), cert. denied sub nom., *Marshall* v. *United States,* 390

U. S. 1005; *Cape* v. *United States*, 283 F. 2d 430 (C. A. 9); *United States* v. *Schanerman*, 150 F. 2d 941 (C. A. 3), *with* the decision below and *United States* v. *Hall*, 342 F. 2d 849 (C. A. 4).

The existing conflict is most readily found in contrasting the result below with the Fifth Circuit's decision in *Fountain* v. *United States, supra,* where it was held that the transcript of recorded conversations was inadmissible and could not under any circumstances be given to the jury during deliberations. Similarly, in *United States* v. *Schanerman, supra,* the Third Circuit held that transcribed notes made by a stenographer from hearing the recordings played were inadmissible.

In the instant case, the admission of the transcripts negated a proper consideration by the jury of the defense of entrapment. The cold, formal typewritten transcripts carried no hint of the flavor of the conversations between petitioner and the agent from which the jury could reconstruct the entire context of the entrapment defense. The defense was, in part, based on portions of these conversations which were totally lost in the reading of the typewritten pages. Moreover, defendant's claim of entrapment primarily occurred duing the meetings which were not tape recorded. Clearly, the jury, by having the transcripts during the entire course of its deliberations, could not possibly have given proper consideration to the only defense presented.

It would seem appropriate for the Court to grant the petition for certiorari in this case because it specifically emphasizes the problem which was foreseen by Mr. Justice Harlan in his dissenting opinion in *United States* v. *White, supra:*

> "The interest *On Lee* fails to protect is the expectation of the ordinary citizen, who has never engaged in illegal conduct in his life, that he may carry on his private discourse freely, openly, and spontane-

> ously without measuring his every word against the connotations it might carry when instantaneously heard by others unknown to him and unfamiliar with his situation or analyzed in a cold, formal record played days, months, or years after the conversation."

It is submitted that the words of Mr. Justice Harlan have even greater force when applied to the typewritten transcripts which were admitted into evidence in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

SEGAL & HUNDLEY,
Attorneys for Petitioner.

NEAL J. HURWITZ,
of Counsel.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 971—September Term, 1970.

(Argued May 28, 1971 Decided June 10, 1971.)

Docket No. 71-1244

UNITED STATES OF AMERICA,

Appellee,

—v.—

ALBERT C. KOSKA,

Defendant-Appellant.

Before:

KAUFMAN, HAYS and MANSFIELD,*

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Marvin E. Frankel, *Judge*, after trial by jury, convicting appellant of unlawfully giving money to an Internal Revenue Agent with intent to influence his action on a field audit examination of appellant's client's tax returns in violation of 18 U.S.C. §201(b) (1964).

Affirmed.

* Of the United States District Court for the Southern District of New York, sitting by designation when argument was heard.

MARVIN B. SEGAL, New York, N. Y. (Neal J. Hurwitz, Segal & Hundley, New York, N. Y., on the brief), *for Appellant.*

JAMES W. RAYHILL, Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, Arthur A. Munisteri, Ross Sandler, Assistant United States Attorneys, on the brief), *for Appellee.*

PER CURIAM:

This is an appeal from a judgment of the United States District Court for the Southern District of New York convicting defendant after trial by jury of unlawfully giving $750 to Internal Revenue Agent Leopold C. Fasone with intent to influence his action on a field audit examination of the tax returns of certain of appellant's clients in violation of 18 U.S.C. §201(b) (1964).

The principal contention raised by appellant concerns the use by the jury at trial and during deliberations of a transcript of conversations between agent Fasone and appellant secretly tape-recorded by Fasone. The transcript was prepared by the government and stipulated as accurate except in two immaterial respects after over 50 hours of work by attorneys for both sides. The jury was allowed to read the transcript while listening to the 5 hours of tape, and later, in response to an explicit request, was allowed to have twelve copies of the transcript during deliberations.

We find no error in this procedure, particularly in light of the fact that the transcripts were stipulated to be accurate. Admission of accurate transcripts as an aid in listening to tape recordings has been held to be a matter

within the discretion of the trial judge. *Fountain* v. *United States,* 384 F.2d 624, 632 (5th Cir. 1967), cert. denied sub nom., *Marshall* v. *United States,* 390 U.S. 1005 (1968). No good reason appears for denying the transcript to a jury which has requested it, where, as here, the jury has already heard the tape and the tape is long and cumbersome. Here the trial judge took the precaution of rendering proper limiting instructions even though the transcript was stipulated to be accurate.[1]

Appellant also contests the admissibility of evidence offered by the government that appellant had previously participated in the bribery of another Revenue Service employee. The evidence was relevant to show the propensity and predisposition of appellant to commit the crime charged in order to counter appellant's defense of entrapment, and was clearly admissible. *United States* v. *Viviano,* 437 F.2d 295, 299 (2d Cir. 1970), cert. denied, 39 U.S.L.W. 3511 (May 17, 1971).

The testimony of an officer of the taxpayer that he had, on another occasion, paid a bribe to an Internal Revenue agent in a situation in which appellant was not involved was introduced for the purpose of anticipating an attempt

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1 "Now let me tell you, further, that although the lawyers have agreed on this transcript as being accurate, with the two exceptions I have indicated to you, it is true in this instance, as in all others, that you, the members of the jury, are the ultimate deciders of the facts, and let me particularize what that means in this specific context:

If at any line of this typed transcript you together hear on the tape something different from what the lawyers have agreed it says, it is your hearing that controls, not mine, not theirs. They are not the triers of fact, neither am I. You are. Now, I am not saying that that will happen, but it could happen, because if my information is correct; some of these portions of the tape are not easy to hear or easy to decipher with your ears, and it is your senses and your judgment about that that ultimately control, and that applies here and everywhere in the case; if there are any exceptions to that, it is my job to tell you about them."

on cross-examination to discredit the witness and was proper for this purpose. The jury could not have been confused as to the purpose of this evidence.

The remainder of appellant's contentions are palpably without merit. The case was properly presented to the grand jury on the testimony of Fasone's supervisor, Atkinson, who heard the conversation through a listening device as it was taking place. His testimony was not hearsay. The fact that all available witnesses were not called would not vitiate the indictment even if the grand jury *had* received hearsay testimony. *United States* v. *Leibowitz*, 420 F.2d 39 (2d Cir. 1969). The appellant's contention that the tape recordings themselves are inadmissible, though consented to by one of the parties to the conversation, is precluded by *United States* v. *Kaufer*, 406 F.2d 550 (2d Cir.), aff'd, 394 U.S. 458 (1969). Similarly, appellant's argument that the Fourth Amendment prevented the government from recording the conversations is foreclosed by the recent Supreme Court opinion in *United States* v. *White*, 39 U.S.L.W. 4387 (April 5, 1971).

We affirm the conviction.

Judgment of United States Court of Appeals for the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of June, one thousand nine hundred and seventy-one.

Present: HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. WALTER R. MANSFIELD,
Circuit Judges.

United States of America,
Plaintiff-Appellee,

v.

Albert C. Koska,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

A true copy,

A. DANIEL FUSARO,
Clerk.

VINCENT A. CARLINI,
Chief Deputy Clerk.

SEAL

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-55

ALBERT KOSKA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the Southern District of New York of giving money to an Internal Revenue agent with intent to influence his official action in violation of 18 U.S.C. 201. He was sentenced to three months' imprisonment and a $10,000 fine. The court of appeals affirmed.

Petitioner's sole contention is that the jury should not have been given a transcript of certain tape recordings which were admitted into evidence. This

contention was discussed fully in the opinion of the court below on which we rely (Pet. App. 2a-3a). Contrary to petitioner's contention (Pet. 4-5), there is no real conflict in the circuits as to the admissibility of a transcript of recorded testimony. No decision has ever been reversed on such a ground. In *United States* v. *Schanerman*, 150 F. 2d 941 (C.A. 3), the court stated in dictum that such a transcript was properly excluded, but there was in that case no showing that the transcript was accurate. Here its accuracy was stipulated. See *United States* v. *Hall*, 342 F. 2d 849 (C.A. 4), certiorari denied, 382 U.S. 812. In *Fountain* v. *United States*, 384 F. 2d 624 (C.A. 5), certiorari denied *sub nom. Marshall* v. *United States*, 390 U.S. 1005, cited by petitioner (Pet. 5), the court specifically approved the use of such a transcript by the jury during the trial to help the jurors identify voices as they listened to the recording. While that decision also approved the trial judge's refusal to send the transcript to the jury during deliberations, it should not be read as holding that such action is ground for reversal where, as here, the essential accuracy of the transcript is unquestioned.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1971.

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